## ARGUMENT

The decisions below, adopting the Board's construction of the relevant provisions of the National Labor Relations Act, are correct. No conflict in decisions is asserted and there is no reason for further review.

1. Section 8(a)(3) of the Act (Pet. 3) permits an employer and union to enter into a union security agreement requiring union membership as a condition of continued employment. This permission, however, does not apply if,

> * * * following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement * * *.

Section 9(e)(1) provides the procedure for invoking such an employee election to rescind the union's authority to enter into a union security agreement.[5]

In this case, the Board ordered an election under Section 9(e)(1) to determine whether to rescind a union security agreement in a contract concluded several months prior to the election order. The Union

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[5] Section 9(e) provides:

> (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

contends that the order was improper for, in its view, Section 9(e)(1) does not permit an election to rescind the union security provisions of an *existing* agreement but merely affects a union's authority to enter into a union security agreement in the future (Pet. 8–10). The Union relies upon the Act's description of the election as one "to rescind the authority of such labor organization *to make* such an agreement" (emphasis added) as indicating its inapplicability to existing agreements. As the Board, the district court, and the court of appeals have held, however, the Union's interpretation of the deauthorization provision as applying only to future agreements would largely frustrate the principal purpose of the provision, which was to prevent a union security agreement from being imposed upon employees without the consent of a majority. The courts below therefore properly rejected the Union's unduly limiting construction.

Under the original 1947 Taft-Hartley amendments, a union security arrangement was permitted only if a majority of the employees, in an election conducted by the Board, affirmatively authorized their representative to enter into such an agreement. Section 9(e)(1) of the 1947 Act provided for such an authorization election. Subparagraph (2) of that section went on to empower the Board to conduct a second election if a petition were filed alleging that the employees desired to rescind an authority previously granted. 61 Stat. 144–145.

In 1951, Congress abolished the affirmative authorization election, finding that "[s]uch elections have

* * * involved a large expenditure of funds and have almost always resulted in a vote favoring the union-shop."[6] Congress, however, made clear its purpose to continue "to safeguard employees against subjection to union shop agreements which a majority disapproves."[7] To this end, the provision for a union security deauthorization election was retained.[8] Under the present statute, therefore, a union security agreement can now be concluded without a majority of the employees first affirmatively authorizing that action through a Board election. For this reason, the continuing explicit legislative purpose to prevent "subjection to union shop agreements which a majority disapproves" can be achieved only by permitting Section 9(e)(1) elections to rescind union security provisions in existing contracts. As the Board stated in reaching this conclusion in *Great Atlantic & Pacific Tea Company*, 100 NLRB 1494, 1497:

> Only by holding that an affirmative deauthorization vote immediately relieves employees of the obligations imposed by an existing union-security agreement can this Board give effect to the basic congressional objective, unchanged by amendments directed solely at procedural relief, of not imposing a union-security agreement upon an unwilling majority.

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[6] H. Rep. No. 1082, 82d Cong., 1st Sess., 2–3; S. Rep. No. 646, 82d Cong., 1st Sess., 1.

[7] *Ibid.*

[8] The provision of the 1947 Act for such elections, Section 9(e)(2), was renumbered Section 9(e)(1), in view of the elimination of the prior provision for affirmative union security authorization elections.

Accord: *Andor Co.*, 119 NLRB 925, 926; *Pearl Curtains*, 118 NLRB 1120, 1121; *Monsanto Chemical Co.*, 147 NLRB 49. And see *Schultz* v. *National Labor Relations Board*, 284 F. 2d 254, 262 (C.A.D.C.), opinion of Judge Danaher dissenting on other grounds.[9]

2. There is no substance to the Union's further contention (Pet. 6–8) that the Board was barred from conducting the deauthorization election in this case because the employees here had in fact affirmatively authorized the union security provision of the existing agreement. The Union's complaint alleges that "the employees who are eligible to vote at [the] deauthorization election unanimously approved the collective bargaining agreement * * * and the union security clause" (App. 7). This informal "ratification" was secured under union auspices, with no assurance that a representative complement of employees participated. It is not comparable to a Board election.[10] A different conclusion is not re-

[9] The Union contends that, under the Board's interpretation, there could conceivably be three deauthorization elections during the life of a three-year contract, thereby leading to "confusion" (Pet 9). But this could occur only in the unlikely event that the Union insisted upon reimposing a union security provision on employees despite their repeated manifestations to the contrary.

[10] Indeed, under the pre-1951 statutory scheme, it was recognized that such methods of approval under union auspices were no substitute for the affirmative authorization election procedure originally contained in Section 9(e) of the Act. *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392, 393 (C.A.D.C.), enforcing as modified, 83 NLRB 916, 919–920.

quired by the excerpt from the Board's *A & P* decision, *supra*, relied on by petitioner (Pet. 7). In noting there that "the employees concerned have never affirmatively authorized a union-security provision," the Board merely referred to the fact that the 1951 amendment eliminated the procedure for an affirmative Board authorization election; the Board was not suggesting, as petitioner assumes, that the result in *A & P* would have been different had there been prior employee "approval" by some informal means.

3. Since the Board's election order in this case was not "made in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188), the court of appeals properly held that the district court lacked jurisdiction to entertain the injunction proceeding and should have dismissed for lack of jurisdiction without finally deciding the merits of the Union's claim. See the Opposition filed on behalf of the Regional Director in *The Miami Herald Publishing Co.* v. *Boire*, No. 225, October Term, 1965, pp. 7–13. The limited nature of the jurisdiction conferred by *Kyne*, to interfere with Board election orders, has recently been emphasized by the Court on three separate occasions. *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 16–17; *Boire* v. *Greyhound Corp.*, 376 U.S. 473; *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650. The exception clearly does not apply to this case, where the Board's order was clearly in furtherance of the evident statutory purpose.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

ARNOLD ORDMAN,
*General Counsel,*
DOMINICK L. MANOLI,
*Associate General Counsel,*
NORTON J. COME,
*Assistant General Counsel,*
WILLIAM WACHTER,
*Attorney,*
*National Labor Relations Board.*

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